

**IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	
)	Chapter 11
INACOM CORP., <u>et al.</u> ,)	
)	Case No. 00-2426 (PJW)
Debtors.)	
)	
INACOM CORP., on behalf of affiliated)	
Debtors,)	Civil Action no. 04-582-GMS
)	Adv. No. 02-3499
Plaintiff,)	
)	
v.)	
)	
DELL COMPUTER CORPORATION, <u>et al.</u> ,)	
)	
Defendants.)	
)	

**REPLY OF PLAINTIFF IN SUPPORT OF ITS MOTION IN LIMINE TO
EXCLUDE EXPERT TESTIMONY OF STEPHEN H. THOMAS**

Plaintiff, Debtors, InaCom Corporation on behalf of affiliated Debtors, through Executive Sounding Board Associates, Inc., Plan Administrator (“Plaintiff”), replies to the opposition filed to its Motion In Limine to exclude testimony by Stephen H. Thomas of Lain Faulkner & Co., P.C. (“Thomas”), designated by Defendants Dell Computer Corporation, Dell Receivables, L.P. and Dell Marketing, L.P. (collectively, “Dell”) as an expert witness under Federal Rule of Evidence (“F.R.E.”) 702. The testimony offered by Thomas must be excluded because it instructs the trier of fact on what legal conclusion to reach, it does not address an ultimate factual issue under F.R.E. 704 and it does not offer expertise helpful to the trier.

Thomas’ qualifications are not at issue, because his purported qualifications, notably in “public accountancy”, were not used.¹ Thomas relied solely on routine invoice and payment

¹ Thomas testified that there was no reason for him to apply general accepted accounting principles, generally accepted auditing standards or Financial Accounting Standard Board rules. (Thomas Dep. Tr. 111:7-111:23). Deposition transcript excerpts from Thomas’ deposition are attached as Exhibit A.

information provided to him entirely by employees of Dell and other information provided to him by Dell's legal counsel.² Thomas then used "simple math" and rendered a legal opinion that the payments to Dell during the preference period were made in the ordinary course of business. (Thomas Dep. Tr. 237:14-237:15).

1. "Simple Math" does not Require Specialized Knowledge

Without any factual or legal support, Dell insists that Thomas's testimony will assist the trier. In In re Shalom Hospitality Inc., 293 B.R. 211, 214 (Bankr. N.D. Iowa 2003), a case cited but misapplied by Dell, the Court stated that "[t]he test for determining the appropriateness of expert testimony is the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." (citation omitted). Nothing Thomas did in his report requires such "enlightenment".

Dell erroneously states that "Thomas analyzed 19,567 invoices during the pre-preference period and additional 611 invoices for the preference period." (Dell Motion, p. 3). This is wrong. Thomas admitted that he did not compile any of the data used in his report, nor did he independently verified any of the invoices – even those which on their face are non-sensical (e.g., invoices purportedly issued 129 days after payment). (Thomas Dep. Tr. 166:9-167:20). Instead, Thomas relied entirely on Dell for the compilation and accuracy of the data and performed nothing more than simple counting to calculate the number of days between the date on Dell's invoices and the date payment was received from Inacom at Dell's lockboxes to render his opinion.³

² Thomas testified that the data for his report came from an electronic database prepared by Dell and that he did nothing to verify its accuracy. (Thomas Dep. Tr. 166:9-167:20).

³ This "simple math" was actually done automatically by Thomas' modified Excel spread sheet software. (Thomas Dep. Tr. at 165:20-165:22; 37:22-38:22).

2. Opinion on the Ordinary Course of Business is a Legal Conclusion not an Ultimate Issue

F.R.E. 704 precludes opinion testimony that embodies a legal conclusion, specifically, one that “inadequately explores legal criteria.” (See Off. Comment F.R.E. 704). That is precisely what Thomas does in opining on the ordinary course of business under §547(c)(2)(B).⁴

Dell relies on In re Kevco, Inc., 2005 Bankr. LEXIS 1249 (Bankr. N.D. Texas June 30, 2005) for the proposition that Thomas has previously testified on the § 547(c)(2)(B) element. However, much in Kevco contradicts Thomas’ opinion in this case. In Kevco the court stated that “reliance on average payment time, as is often the case with statistics, does not portray the complete picture of [the debtor’s] payment history”. Kevco at *45. The ordinary course of business analysis must also take into account any credit holds, shipment holds, manner of payment (overnight vs first class), number of invoices covered by a single check and numerous other particularities that mark the preference period. Kevco, pp. 52-56.⁵ Thomas’ report considers none of these factors. Rather, Thomas uses “simple math” to perform subtraction and relies entirely on employees at Dell and the advice of Dell’s legal counsel in rendering his opinion, which amounts to nothing more than an instruction to the Court on how to rule on Dell’s § 547(c)(2)(B) defense. This is not expert testimony and it should be excluded.⁶

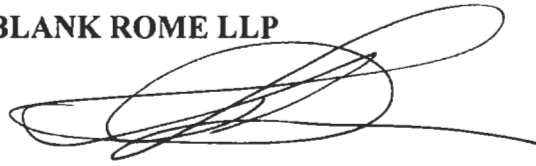
⁴ Contrary to Dell’s reliance on In re Brothers Gourmet Coffees, Inc., 271 B.R. 456 (Bankr. D. Del. 2002), the creditor’s expert in that case did not testify on what the “ordinary course of business” was. Rather, he opined on the standard term in the green coffee industry. In re Brothers, at 461.

⁵ The Kevco decision contains no discussion of Thomas’ qualifications, nor does it set forth the contents of his report. Indeed, it is not possible to tell from reading Kevco precisely what opinion Thomas offered, if any.

⁶ Thomas testified that while he became aware of unusual collection activities by Dell well after he wrote his report, and just a day before his deposition, Dell’s counsel advised him that these facts were not relevant to the preference period and he, therefore, did not consider them in his opinion. (Thomas Dep. Tr. 150:25-152:5.)

Respectfully submitted,

BLANK ROME LLP



Dated: September 6, 2005

Bonnie Glantz Fatell, Esquire (DE No. 3809)
Elio Battista, Jr. (DE No. 3814)
Alisa E. Moen, Esquire (DE No. 4088)
Chase Manhattan Centre
1201 Market Street, Suite 800
Wilmington, DE 19801
Tel: (302) 425-6400
Fax: (302) 425-6464

- and -

Earl M. Forte, Esquire
Regina Stango Kelbon, Esquire
One Logan Square
Philadelphia, PA 19103
Tel: (215) 569-5500
Fax: (215) 569-5555

Attorneys for Plaintiff Executive Sounding Board
Associates, Inc., as Plan Administrator for Debtors

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

In re:) Chapter 11
)
INACOM CORP., et al.,) Case No. 00-2426 (PJW)
)
Debtors.) Jointly Administered
)
-----)
)
INACOM CORP.,)
) Civil Action No.
On behalf of all affiliated) 04-582 (GMS)
Debtors,)
Plaintiffs,)
)
V.) Adv. Pro. No.
) 02-03499 (PJW)
DELL COMPUTER CORPORATION,)
Et al.,)
Defendants.)
-----)

ORAL DEPOSITION OF

STEPHEN H. THOMAS

JULY 13, 2005

ORAL DEPOSITION of STEPHEN H. THOMAS, produced as a witness at the instance of the Plaintiffs, and duly sworn, was taken in the above-styled and numbered cause on the 13th day of July, 2005, from 9:33 a.m. to 4:29 p.m., before David Bateman, RPR, CSR in and for the State of Texas, reported by machine shorthand, at the offices of Hughes & Luce, LLP, 111 Congress Avenue, Suite 900, Austin, Texas 78701, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

A P P E A R A N C E S

FOR THE PLAINTIFFS:

MR. EARL M. FORTE
Blank Rome, LLP
One Logan Square
18th & Cherry Streets
Philadelphia, Pennsylvania 19103-6998
(215) 569-5618

FOR THE DEFENDANT DELL COMPUTER CORPORATION:

MS. SABRINA STREUSAND
Hughes & Luce, LLP
111 Congress Avenue, Suite 900
Austin, Texas 78701
(512) 482-6842

ALSO PRESENT:

MR. MICHAEL L. NEWSOM (Via Telephone)
Bridge Associates, LLC

1 A Some of the materials previously existed, such
2 as an example XY chart and how to read it. Others were
3 created right before the seminar.

4 MS. STREUSAND: You prepare like the rest
5 of us.

6 Q (BY MR. FORTE) How long have you been using an
7 XY graph in your analysis of preferences?

8 A I believe my very first XY graph used in a
9 preference analysis may have been nine or 10 years ago.

10 Q What software is used for that?

11 A At that time, it was an Excel spreadsheet.

12 Q Is it still an Excel spreadsheet?

13 A No.

14 Q What is it now?

15 A Our software system is a Sequel server
16 database back-end with an Access front end or user
17 interface grafted together.

18 Additionally, there's some custom
19 programming, one of which is taking what started out
20 life as an Excel XY graph, tweaking it to fit into that
21 system. Thus it generated the charts you see.

22 Q Well, I'm not sure I understood all that. But
23 you -- you took the Excel XY graph and modified it?

24 A Uh-huh.

25 Q You have to say "yes" or "no" so he can get it

1 down.

2 A I'm sorry. Yes.

3 Q Thank you. And how precisely did you modify
4 the Excel spreadsheet?

5 A I didn't do the modification, so I wouldn't be
6 able to tell you. We hired a programmer to do that.

7 Q Well, did you give instructions to the
8 programmer as to what you wanted?

9 A Yes.

10 Q What instructions were those?

11 A Make it look like the graph in my expert
12 report as opposed to the graph that comes out of the
13 stock Excel schedule.

14 Q How does it differ?

15 A The Excel -- other than the basic concept of
16 the two axes and plotting data points, the Excel
17 schedule doesn't have any of the titles and it doesn't
18 look like that. So we made it look the way we wanted.

19 We chose to put certain report
20 restrictions and certain statistical data up there and
21 the titles so that it would be a little more
22 user-friendly and easier to read, we hoped more useful.

23 Q Can -- can you give me a precise example of
24 what was added to the Excel form?

25 A Other than saying everything on that tab,

1 A I can't quote it. It's the AICPA Code of
2 Professional Conduct.

3 Q Did you conduct your report and opinion in
4 this case in accordance with the AICPA Code of
5 Professional Conduct?

6 A Yes.

7 Q In this matter, were there any reason for you
8 to apply general accepted accounting principles?

9 A No.

10 Q How about general accepted accounting
11 standards?

12 A Generally accepted accounting standards?

13 Q Excuse me. Generally accepted auditing
14 standards.

15 A No.

16 Q How about any of the rules or guidelines set
17 forth by the Fair Accounting Standards Board?

18 MS. STREUSAND: Objection to the form of
19 the question.

20 Q (BY MR. FORTE) Maybe I'm using the wrong
21 title. FASB, F-A-S-B, doesn't that stand for Fair
22 Accounting Standards Board?

23 A I don't think so.

24 Q What -- what does it stand for?

25 A I don't know, but it's not fair. Well, that's

1 affect on the preferential payments?

2 A I base that on the timing of the e-mails, the
3 content of the e-mails and the timing of the preference
4 payments.

5 Q What do you mean by that?

6 A Okay. If I -- if I may just generally
7 explain, my one-time-through reading of the e-mails led
8 me to believe that, generally, the topic of those
9 e-mails was the creditworthiness of InaCom and the
10 ability of Dell to collect monies owed to it by InaCom
11 and the timing of those payments.

12 And I think at a -- a noteworthy factor
13 in those e-mails was what was categorized as a soft
14 credit hold on a few of the InaCom customer accounts.
15 I understand that the soft credit hold was lifted and
16 was not in effect during the preference period and that
17 the reason I say this doesn't affect the preference
18 period is that it's my understanding, based on my
19 understanding of case law, is that credit holds might
20 be construed in some cases as unusual collection
21 efforts.

22 And that impacts a preference payment if
23 a preference payment is made in response to unusual
24 collection efforts.

25 Q Based on Mr. Horton's e-mails, do you remember

1 the date on which the credit hold imposed by Dell was
2 resolved?

3 A Not based on the e-mails.

4 Q Based on something else?

5 A Yes.

6 Q Based on what?

7 A It was represented to me by counsel that, at
8 some point in time after those e-mails but before the
9 start of preference period, a financial transaction
10 involving Compaq -- and I really don't know what that
11 was -- occurred, which made funds available to catch
12 everything up.

13 Thus it was no longer an issue by the
14 time the preference period started.

15 Q Okay. So it was based on something that
16 occurred after the period of the e-mails but before the
17 preference period. Is that what you said?

18 MS. STREUSAND: Objection to the form.
19 That mischaracterizes his testimony.

20 A The e-mails talk about certain issues and
21 factors. And the last e-mail was somewhere in early or
22 mid-February. I don't recall the date. I was told by
23 Ms. Streusand that in mid-February this transaction
24 occurred, which allowed InaCom to clear up any of these
25 issues that might be leading to these soft credit

1 holds.

2 Thus it was no longer an issue or factor
3 at the start of the preference period. And
4 accordingly, none of the preference payments could have
5 been made in response to that soft credit hold.

6 Q (BY MR. FORTE) What was the transaction that
7 you were informed about?

8 A The Compaq transaction.

9 Q Do you know what that was?

10 A No.

11 Q Other than calling it the Compaq transaction,
12 do you know anything about it?

13 A Apparently, it generated some kind of funds to
14 be available to InaCom.

15 Q Have you seen any documents showing how funds
16 from the Compaq transaction were disbursed?

17 A No.

18 Q So you're basing this solely on what counsel
19 told you?

20 A Yes.

21 Q Did you make an attempt to verify what counsel
22 told you?

23 A No.

24 MS. STREUSAND: For clarification
25 purposes, did you also review the e-mails?

1 Vendor correctly, tell me if I'm wrong. That just
2 simply shows that, between February 1st, 1998 and March
3 17th, 2000, Dell sold \$183,822,705.41 of computer
4 equipment to InaCom; is that correct?

5 A That's the total of their invoices.

6 Q Right. And the total paid?

7 A Correct.

8 Q All right. Now Days to Payment to the right,
9 there is a number of items listed there: Mean, max,
10 min, median, standard deviation.

11 Could you explain for me first what the
12 mean is, 44.16?

13 A A layman would call that the average. I think
14 mean and average are synonymous.

15 Q What is it the mean of?

16 A The days to payment.

17 Q It's the average number of days between the
18 invoice date and the payment date?

19 A Correct.

20 Q And I assume that was just calculated
21 automatically by your computer.

22 A Yes.

23 Q So you're comfortable that it's accurate?

24 A Absolutely.

25 Q And what does max, M-A-X, mean?

1 A Maximum, the largest.

2 Q The largest days to pay?

3 A Yes, days to payment.

4 Q Okay. So that -- in other words, the invoice
5 that was the oldest during this two-year period?

6 A It is the greatest number of days between the
7 payment date and the invoice date, not necessarily the
8 oldest invoice.

9 Q Okay. I understand, 385 days. And minimum,
10 minus 129, what does that mean?

11 A That's the shortest, smallest number of days
12 to payment between the -- it's the shortest or minimum
13 number of days to payment during the historical period.

14 Q Why is it a negative number?

15 A According to the data we had to work with, a
16 payment was made before an invoice date.

17 Q By 129 days?

18 A Yes.

19 Q How were you able to discern that the payment
20 was for an invoice if it had not been identified yet?

21 A That's the way it came to me in the electronic
22 payment database.

23 Q So in other words, InaCom would make a payment
24 to Dell and Dell would issue an invoice for that
25 payment 129 days after receiving payment?

1 A That's what the electronic database says.

2 Q Did you do anything to verify if that's
3 accurate?

4 A No. That happened once for 14 hundred dollars
5 and change.

6 Q Only one time?

7 A Once.

8 Q Did anyone at Dell or elsewhere explain to you
9 how that happened?

10 A No.

11 Q Well, what's the minimum if you exclude the
12 negative 129? Do you know?

13 A I can tell you by looking at my reports.

14 Q Please do.

15 A Then the minimum is 110.

16 Q And that's not a negative number?

17 A It's a negative number.

18 Q So that's another situation where payment was
19 made 110 days before an invoice was issued?

20 A According to the electronic database.

21 Q Excluding all negative numbers, all negative,
22 quote, minimums based on your chart, do you know what
23 the shortest days to pay was?

24 A Yes.

25 Q What?

1 somehow one of the numbers happened to come out to 95
2 percent, which almost by definition is two standard
3 deviations. So I'm just quoting what he said in his
4 deposition.

5 Q All right. Well, let's go on to paragraph
6 four of the Newsom rebuttal report. With regard to Mr.
7 Thomas's report, there is no basis in statistics for
8 him to conclude that the ordinary course range
9 reflected in this data is from 27 to 71 days.

10 Do you agree with that statement?

11 A If I understand what basis and statistics
12 mean, if you mean adding, subtract, divide and multiply
13 calculating number of days between dates, then I
14 disagree because I do base my opinion on that simple
15 and not deep math.

16 If by statistics you mean standard
17 deviation, I agree.

18 Q Mr. Thomas states that this ordinary course
19 bracket included 95 percent of the dollars paid which,
20 according to his calculations, is just one standard
21 deviation. Do you agree with that?

22 A I vehemently disagree. I have no idea how he
23 came up with that.

24 Q Well, how do you disagree with it?

25 A Show me in my report where my calculations of

CERTIFICATE OF SERVICE

I, Alisa E. Moen, hereby certify that on this 6th day of September 2005 I caused a copy of the **Reply of Plaintiff in Support Of Its Motion In Limine To Exclude Expert Testimony Of Stephen H. Thomas** to be served upon the following counsel in the manner indicated:

VIA US MAIL AND FACSIMILE

Sabrina L. Streusand, Esquire
G. James Landon, Esquire
Hughes & Luce, L.L.C.
111 Congress Avenue, Suite 900
Austin, TX 78701

VIA HAND DELIVERY

Patricia P. McGonigle, Esquire
Seitz, Van Ogtrop & Green, P.A.
222 Delaware Avenue, Suite 1520
P.O. Box 68
Wilmington, DE 19899

Laura Davis Jones, Esquire
Pachulski Stang Ziehl Young Jones & Weintraub, P.C.
919 North Market Street
Suite 1600
Wilmington, DE 19899

A handwritten signature in black ink, appearing to be 'Alisa E. Moen', written over a horizontal line.

Alisa E. Moen (DE ID No. 4088)